

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**PETER T. INFANTE, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Aguada, PR, Employer**

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**Docket No. 05-1588  
Issued: January 4, 2006**

*Appearances:*

*Ruben Morales, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On July 19, 2005 appellant filed a timely appeal of an Office of Workers' Compensation Programs' decision dated July 20, 2004, denying his claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of the case.

**ISSUE**

The issue is whether the Office properly determined that the issue presented was whether appellant sustained a recurrence of disability as of August 12, 1999.

**FACTUAL HISTORY**

On October 27, 1987 appellant, a 49-year-old modified distribution clerk, filed a traumatic injury claim alleging that he injured his back while in the performance of his federal duties. The claim was accepted for lumbosacral sprain, discogenic disease L4, L5 and S1 and radiculopathy. Appellant returned to light duty on August 16, 1997.

By decision dated November 14, 1997, the Office determined that the duties of appellant's new position reflected the work tolerance limitations established by the weight of medical evidence in his file. The Office further determined that appellant's actual earnings of \$354.45 per week as a modified distribution clerk fairly and reasonably represented his wage-earning capacity. The Office decreased appellant's compensation based on his actual earnings.

On August 23, 1999 appellant filed a claim for a recurrence of disability alleging that on October 5, 1998 he tore his left bicep proximal tendon and injured his lower back simultaneously. He stopped working on August 12, 1999.<sup>1</sup>

By decision dated July 8, 2003, the Office denied appellant's claim for recurrence of disability on the grounds that there was no medical evidence demonstrating a change in the nature and extent of appellant's work-related conditions or job duties and no explanation presented relating appellant's current condition to his October 1987 injury.

On July 22, 2003 appellant requested a review of the written record. Appellant submitted numerous notes and medical reports including a May 21, 2003 report from Dr. Marisol Rivera Mislá, a treating physician, who stated that he first treated appellant on December 1, 1999 for low back pain resulting from a reported 1998 work-related accident. He provided diagnoses of reactive depression, post-traumatic myositis, postlaminectomy pain syndrome, chronic low back pain and opioid dependence. In an October 29, 2002 report, Dr. Jose R. Busquets, a treating physician, opined that appellant was totally disabled due to his multiple medical conditions, including failed back surgeries, polyarthritis, cardiac and pulmonary diseases, major depression, musculoskeletal disorders and peripheral neuropathy.

By decision dated July 20, 2004, the Office hearing representative affirmed the July 8, 2003 decision on the grounds that appellant had failed to establish that he had suffered a recurrence of disability as of August 12, 1999 causally related to the accepted work injury of October 26, 1997. The hearing representative further determined that appellant had not provided sufficient evidence to establish that there was a change in the nature or extent of the injury-related condition or a change in the nature or extent of the light-duty requirements which would prohibit him from performing the light-duty position he assumed after his return to work.

### **LEGAL PRECEDENT**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>2</sup>

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<sup>1</sup> The record reflects that appellant filed numerous claims with the Office. Prior cases include No. A02-0553340; A02-0558006; A02-0758414; and the instant case A02-0578703P. A claim for left shoulder, upper back and leg injuries occurring on October 5, 1998 was initially denied on July 12, 1999. A subsequent Branch of Hearings and Review's decision affirmed that denial decision on June 12, 2000. Appellant then appealed to the Board. In an April 23, 2002 decision, the Board remanded the case to the Office for additional development of the medical evidence. Docket No. 02-27 (issued April 23, 2003).

<sup>2</sup> See *Sharon C. Clement*, 55 ECAB \_\_\_\_ (Docket No. 01-2135, issued May 18, 2004).

The Office's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."<sup>3</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.<sup>4</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>5</sup>

### ANALYSIS

In this case, the Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of disability as of August 12, 1999. Under the circumstances of this case, however, the Board finds that the issue presented was whether the November 14, 1997 wage-earning capacity determination should be modified.

According to the evidence of record, appellant returned to his light-duty assignment on August 16, 1997. Dr. Busquets opined that appellant was totally disabled due to his multiple medical conditions, including failed back surgeries, polyarthritis, cardiac and pulmonary diseases, major depression, musculoskeletal disorders and peripheral neuropathy. It is clear that the claim in this case was that appellant could not work in the light-duty position, the position that the Office determined had represented his wage-earning capacity, for the foreseeable future. The Board has held that, when a wage-earning capacity determination has been issued, and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of wage-earning capacity is warranted.<sup>6</sup>

As noted above, the Office's procedure manual directs the claims examiner to consider the criteria for modification when the claimant requests resumption of compensation for "total wage loss." This section of the procedure manual covers the situation when a claimant has stopped working. In this case, appellant submitted evidence of worsening of his condition that allegedly prevented him from working in the light-duty position. The Board finds that the Office should have considered the issue of modification of the wage-earning capacity determination.

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<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Katherine T. Kreger*, 55 ECAB \_\_\_\_ (Docket No. 03-1765, issued August 13, 2004).

<sup>4</sup> See *Katherine T. Kreger*, *supra* note 3. See also *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>5</sup> *Id.*

<sup>6</sup> See *Katherine T. Kreger*, *supra* note 3.

### **CONCLUSION**

The Board finds that appellant's claim for compensation raised the issue of whether a modification of the November 14, 1997 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue. On remand, the Office should consolidate appellant's claims, reconstruct the file and issue a decision based on the entire record.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 20, 2004, is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 4, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board